ROMAN LAW IN MODERN LIFE AND EDUCATION[1]

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This discussion might be entitled, an experiment in classical education and how it failed. It deals with a certain small boy born in the middle nineties. It is in a way an *Apologia pro Mea Vita Paedagogica.* The excess of *ego dixi et meus filius respondit* in it may, therefore, perhaps be pardoned by a confession at the outset that it is an account of failure on the part of the speaker to solve a troublesome pedagogical question and a very satisfactory solution of the same problem by one of his colleagues in the Latin Department.

Some of you may remember that the Latinists were troubled a number of years ago about the transition from the Beginning Latin Book to Caesar. In those years before we had learned so much about trench fighting in France, the campaigns of Caesar with all their wealth of military detail seemed to be very difficult reading for an American boy. The difficulty of translation was not so much in finding the English equivalent for the Latin word as it was in grasping the content of the Latin word itself. In the earlier part of the present century I was trying the experiment of starting a nine-year-old boy in the study of Latin. I hope the Lord has forgiven me for this. He certainly has punished me. That boy would never take any Latin after he left the high school. There were wheels in his head even then, and they are still there. He was graduated from college as an automobile engineer and is now chasing buzzards in Texas in a DeHaviland plane with an engine running 2000 R.P.M.

In our beginning book, which was one that was used in *Sexta* in the German Gymnasium—how Teutonic we were in those days—occurred the word *praeda,* which was translated for him by the

[1] Discussion of Professor Crittenden's paper at the Michigan Classical Conference, May 3, 1919.

orthodox equivalent. But what did a little American boy in the early days of the twentieth century know about "spoil"? It had to be transferred to his environment. The Ann Arbor team had been playing football with the Ypsilanti team. It was suggested to him that if our team at the conclusion of a successful game had broken into the gymnasium and brought home a wagon-load of stuff we should have called it "spoil." The illustration got across. The next time the little boy ran across *praeda*, he translated it correctly "a wagon-load of stuff."

The Latinists set to work to solve this difficulty by hunting up some Latin that would be easier than Caesar. There were editions, with the hidden quantities marked, of "*Viri Romae*," "The Lives of Nepos," "Selections from Quintus Curtius." "The Fables of Phaedrus," "Selections from Erasmus," and "Latin Made in America." Much painstaking work by more or less eminent members of the profession was lavished upon these editions. It was love's labor lost. I believe it is not too harsh to say that they were all failures and the movement itself was a failure, as it was foredoomed to be. I am informed that nearly all the schools have gone back to Caesar, and those men that worked along the line of the elaborate annotation of the text of Caesar and in this way translated the environment of Caesar and put an intelligible connotation into his words scored the success.

But to proceed with the education of the small boy: A wandering swarm of bees alighted one morning on a neighbor's apple tree and he was for taking charge of them and hiving them. His whilom Latin instructor was able to tell him that the law defining his right as discoverer of the bees was carefully defined in a New York case (*Golf* v. *Kilts*, 15 Wend. N.Y. 530) decided in the earlier part of the last century, in which the court cited Blackstone (eighteenth century), who in turn quotes Bracton (thirteenth century) as authority, and Bracton goes back to Justinian.[1]

Not long after this fortunate combination of the real with the cultural elements in his classical education, the small boy became quite interested in the logs cast up on the beach of the island of "blessed leisure" where he spent his summers. He wanted

[1] *Inst.* ii. 1. 14.

very much to appropriate these logs to make a dock, and again the question of *meum* and *tuum* was solved—not in accordance with his desires—first by the English cases and then by Justinian. Though there was no traceable connection between the rules in the English and Roman systems, both prohibited the finder from appropriating to his own use marked logs whose marking gave evidence that they had not been abandoned by their original owner.

Then he wanted to go fishing in the pot-net which was set at the head of the island where he could see the big fish swimming around, apparently eager to be caught. Might he legally do so? Again an English decision of the first half of the nineteenth century would have answered his question in the affirmative. He might take the fish, if he got there before the owner of the net closed up the hole that gave ingress for the fish and consequently a possibility of egress and escape. See *Young* v. *Hichens* 6 Q. B. 606 (1844), though he would have found an earlier New York case, *Pierson* v. *Post*, 3 Caines (N.Y.) 175 (1805), on almost the same state of facts, in which there was a strong dissenting opinion; and he might have been told that the authorities had always had difficulty in deciding who had the better right on this state of facts—this wavering of the authorities appearing as early as the time of Justinian, who, after stating that his predecessors were uncertain about it, decides that the small boy has the better right.[1]

Our trout brook ran down to the lake between the farms of Dick White and Jim Dunn. At one place the current had broken across a bend in the brook, making a new channel and leaving a bit of land between the new channel and the old, so that the land that had been on the south side (Jim Dunn's) was now on the north side (Dick White's). Did Dick White now own the bit of land that formerly belonged to Jim Dunn? Here was the pedagogue's opportunity. In the case of *Nebraska* v. *Iowa*, 143 U.S. 359, the physical facts were identical with those cited above. The Missouri River between Omaha and Council Bluffs had cut across the "ox-bow" and the State of Nebraska claimed jurisdiction

[1] Justinian ii. 1, 13.

over the land that had formerly been on the Iowa side of the river. Iowa resisted the claim. As the parties were from different states they went to the United States Supreme Court for an adjudication of their claims. In a masterly opinion by Justice Brewer the principle of decision was traced back to its source. Quoting from an opinion of an Attorney General of the United States on a similar dispute between our government and Mexico, in consequence of changes in the channel of the Rio Bravo, the court showed that the principle that the jurisdiction was unchanged was an established element in the law of Mexico, to which it had come from the law of Spain. Alfonso the Wise had transferred it in 1265 from the Italianized Roman law to his *Sieta Partidas*. The Italians of the Bolognese schools had taken it from Justinian (sixth century); Justinian had borrowed it from Gaius (second century), who gave it as well-established law in his day. On the English side the same principle was traced back to Bracton who published his *De legibus consuetudinibus Angliae* in the same decade of the thirteenth century that Alfonso published his *Partidas* and drew from the same source. Bracton had used Azo, an Italian jurist of the thirteenth century, whose *Instituciones* were based on the *Institutes* of Justinian, and thus we again get back to Gaius and the classic Roman law. So Jim Dunn still owns the land in the "ox-bow" on McKay's Brook.

But *quid est quod haec fabula docet?* Well! there are two lessons to be learned from it, one that Rollo may be thankful for, and both of which may be helpful to his teacher. Professor Crittenden has shown by his paper that in this argument between the Anglicists and the Romanists as to the historical relations between Roman law and the English common law, the Anglicists have the better of it. Stubbs is right[1] when he says that the coming of the Angles and the Saxons to England in the middle of the fifth century drew a sponge over the Roman-Keltic civilization of England. Teutonic "Kultur" was just as destructive of Latin culture in the fifth as it was in the twentieth century. Anglo-Saxon legal and political institutions for the next six centuries had an independent development along Teutonic lines.

[1] See *Constitutional History of England*, Vol. I, chap. ii.

Even when the Conquest brought over to England the Norman law, with its large infiltrations of Roman law, it was the feudal elements of Norman-French law—the law of land—that became incorporated into the English common law, and feudalism, whether of the old Anglo-Saxon type or of the Norman-French type, is essentially Teutonic or at least post-classical and therefore non-Roman in essence.

Professor Crittenden has already shown the relation of Glanvil in the twelfth century and of Bracton in the thirteenth to the sources of law. Both of them, but especially Bracton, stated the native English law in the form used by the classical Romans. Bracton's service to the English law was similar to that of Edward Livingston and his colleagues to the Louisiana law. They were directed to follow the form of expression of the *Code Napoleon* whenever that code was not at variance with the basic law of Louisiana, which was at that time the Spanish-Roman civil law. Bracton used Azo as the framework into which he put the principles of English common law. The hand was the hand of Esau, but the voice was the voice of Jacob, or rather of *Johannes Taurus*.

For the next six centuries, because of the conflict between Roman pope and English king, and later between Catholicism and Protestantism, there was actual antipathy, sometimes manifested in formal enactment, against all things Roman. Even during this period, however, there were occasional borrowings from the classical system. Ejectment as a possessory action in English law has all the essential characteristics of the old classical *interdictum unde vi* and probably passed from the Roman law through the *actio spolii* of the canonists into the common law. English equity is, however, a native product, although there are many superficial resemblances between English chancery rulings and the principles of Roman *aequitas*, principally due to the fact that the early English chancellors were usually clerics and found in the *jus honorarium* of the praetors, equitable principles that could be readily applied in their courts. Since the anti-Romanist feeling has died down in England and in America, the borrowing from Roman law has been commoner. One of the most interesting instances

of this is found in the American courts of the earlier part of the last century. In the period succeeding our War of Independence, the anti-British feeling ran so high that it affected even our court decisions. Our courts, particularly those of New York and Massachusetts, are liable to go to the Roman law—usually that of the French or Dutch commentators—for guidance during the first half of the nineteenth century, and our scholarly courts of the present time frequently "adopt" Roman law principles even from the law of the classical period. The Roman law of waters was translated from the *Corpus Juris Civilis* for the use of our western and southwestern courts because the Roman law, like that of the arid states, favors the first appropriator rather than the riparian owner. But after giving due credit for all these borrowings, it still remains true that the two systems are essentially distinct. The law of the western—we used to call it the civilized—world is not one tree with Roman and English branches. It is rather two distinct trunks with interlacing branches, so closely interwoven sometimes that it is hard to separate them; but nevertheless such statements as that of Sir William Jones, to the effect that the Roman law "is the source of nearly all our English law . . . . not of feudal origin"[1] is essentially misleading, and altogether lacking in historical perspective. So much as to the relation of the sources.

Now as to the pedagogical question that is of interest both to the small boy and to his teacher. A couple of years ago, after the above-described experiment in classical teaching was an assured failure, Professor Crittenden invited me in to hear a class on which he was trying another experiment. He had a class of twelve boys, not one of whom had had more than a couple of years of Latin study, though all of them were of college age. Some of them had taken only one semester of Latin in the University, which is popularly supposed to have the same value as one year in the high school. Whether this is true or not would seem to depend on whether they had had as good a teacher in college as these boys had. Some of them had not studied Latin for several years and what study they had given to it was in a poor school or

[1] Quoted with approval in Sherman's *Roman Law in the Modern World.*

under poor instruction, or both. The class was as a whole about equal to the average class that comes to most of you for the second year's work in Latin. They were using an unannotated text and were taking about a page a day of the Teubner text of the *Institutes* of Justinian. To my astonishment they were reading it and not simply upsetting it. They were reading about the property in the swarm of bees escaping from a hive, of the right to the abandoned logs, of the legality of fishing in the pot-net and as to who had title to the land in the "ox-bow" on McKay's Creek. The rights of the parties were here set out in plain and simple terms, in language that generations of jurists had labored over to make as concise and as lucid as was possible. The subject-matter was as comprehensible to a boy of the twentieth century as it was to one of the first. The environment did not need translation. It is needless to say that the class was interested. This experiment had succeeded where the others had failed. Possibly the reason for the success in the one case and the failure in the other was due to the difference in the experimenters. Cerainly in all my years of school visiting I have never seen better Latin teaching than this class was receiving, but I am sure that this experimenter had found a better tool than most of us had been using before.

I have no advice to offer as to what use should be made of this object lesson. I am old enough to realize the futility of offering unsolicited advice, but I am sure that if I were having difficulty in making the transition from the Beginning Book to Caesar with a class of tenth-graders I should procure Professor Crittenden's edition of selections from Justinian's *Institutes* and try to repeat his success.

It may be added that Professor Crittenden, after his several years' experimentation with this course, thinks that it would better be introduced as a partial substitute for Cicero—say for two of the Catilinarians—than for an equivalent amount of Caesar. The dead point in the high-school Latin is quite likely to come in the middle of the course and if this Latin, which is so sure to stimulate interest as being connected with the boy's environment, were introduced at this time it might carry him through the next two years and thus save him for the college course in Latin.

As a message from Philistia to Culturia, high-school teachers may say to boys who are looking forward to a career in law that the law schools wish students to come to them with the capacity to read Latin and French, and this for purely practical and disciplinary reasons. The classicists may be left to take care of the culture argument. Scientific law of the present time must be studied from the historical and comparative standpoints if we expect law to grow along the lines of the basic principles of justice. But how can a comparative study of law be made unless the legal rules can be read in the original texts? And this means *reading*, not a mere capacity to dig out the meaning with aid of dictionary or grammar. It is not enough that a law student can distinguish the writ of *habeas corpus* from the constitutional principle of *E Pluribus Unum* and possibly differentiate both from the *Ne plus ultra* cigarette. He must *read* Glanvil and Bracton, the *Year Books* and the *Abridgments*, the *Code Napoleon*, the *Sieta Partidas* and *De Jure Belli et Pacis*. He cannot get this capacity in two years of high-school Latin, nor in four, but with two or three years' college training in language study he will be prepared to begin the study of law in a truly scholarly way. Let us hope that the suggestion of this experiment by Professor Crittenden may help a goodly number of boys over the *pons asinorum* on to the *via delectabilis eruditorum*.